

No. 83-1052

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IN THE  
**Supreme Court of the United States**

October Term, 1983

WILLIAM R. PHILLIPS,

*Petitioner,*

*against*

HAROLD J. SMITH, Superintendent,  
Attica Correctional Facility,

*Respondent.*

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit

**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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### **Counter-Statement of Question Presented**

May a federal court sitting in habeas corpus review of a state conviction, which is otherwise precluded from entertaining a claim forfeited in state court, nonetheless entertain that claim merely because a state court, in addition to its unequivocal forfeiture holding, also summarily concluded that the error, if any, was harmless?

The court below answered this question in the negative.

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**Preliminary Statement**

Petitioner seeks a writ of certiorari to review a September 2, 1983 judgment of the United States Court of Appeals for the Second Circuit. By that judgment, the Court of Appeals unanimously affirmed a November 24, 1982 order of the United States District Court for the Southern District of New York (Lee P. Gagliardi, D.J.), denying a

petition for a writ of habeas corpus. In his petition, Phillips sought to vacate a January 28, 1975 judgment of the New York Supreme Court, New York County, convicting him after trial by jury of two counts of Murder (former New York Penal Law §125.25) and one count of Attempted Murder (former New York Penal Law §§110.00/125.25). Phillips was sentenced to concurrent indeterminate terms of from twenty-five years to life imprisonment for the murder convictions and eight and one-third to twenty-five years for the attempted murder conviction. He is currently serving this sentence.

## **Statement of the Case**

### **A. Introduction**

Between 1965 and 1968, William Phillips, a corrupt New York City police officer, had extorted regular payoffs from a pimp and bookmaker named Jimmy Smith. On Christmas Eve, 1968, Phillips went to Smith's brothel and, when Smith refused to make the payment demanded, Phillips shot and killed him. Phillips then shot two eyewitnesses, Sharon Stango, a nineteen-year-old prostitute who worked for Smith, and Charles Gonzalez, a customer at the brothel. Stango was killed, but Gonzalez, though seriously wounded, survived.

After the Smith-Stango murders, the police had obtained a description and composite sketch of the murderer from Charles Gonzalez and Richie Stevens, a handyman at Smith's building who had seen the murderer going to and from the murder scene. In addition, one of Smith's pros-

titutes had suggested that the murderer was a policeman. The investigation continued, but without success.

In late 1971, Phillips testified at the televised hearings on police corruption conducted by the New York City Knapp Commission. When Phillips appeared on television, a detective working on the Smith-Stango murders noticed that Phillips resembled the composite sketch which had been obtained from the eyewitnesses. Phillips subsequently was identified by both Gonzalez and Stevens. He also was identified by several of Smith's ex-prostitutes and customers, who had seen him in Smith's company numerous times and had overheard him demanding money from Smith under the threat of force.

Subsequently, a New York County grand jury charged Phillips with the murders of Smith and Stango and the attempted murder of Gonzalez (Ind. No. 1370-72). Phillips proceeded to trial on June 28, 1972. On August 9, 1972, the jury reported itself unable to reach a verdict, and a mistrial was declared.

### **B. The State Trial and Direct Appeal**

Petitioner's second trial, the subject of the instant petition, began in New York State Supreme Court on September 16, 1974. During the nine-week trial, forty-four witnesses, including petitioner, testified.\*

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\* Because the sufficiency of the evidence of petitioner's guilt is not an issue here, the evidence adduced at the lengthy trial will not be recounted in full. Such an account can be found in the State's memorandum of law to the District Court, filed in response to the renewed petition, at pp. 2-27. This memorandum was part of the record before the Second Circuit and will be forwarded upon request.



Charles Gonzalez, the surviving victim, identified petitioner as the man who shot him, after shooting Jimmy Smith and Sharon Stango at point blank range in the head (Gonzalez: 634-38). Richie Stevens, the handyman of Smith's building, also identified petitioner as the man who entered the building moments before the killings, went up to Smith's apartment, and then left the building moments before the bodies were discovered (Stevens: 2090-01, 2101-03). There was also testimony from several of Smith's prostitutes and customers that petitioner had been shaking down Smith for money since 1965, repeatedly came to Smith as Christmas Eve 1968 approached to demand money, and, the night before the murders, threatened to "blow Smith's . . . head off" if Smith did not pay petitioner \$1000 the following day (Rodgers: 1381, 1387; Charmello: 2334-42, 2347-48, 2356, 2488-89; Stevens: 2082; Lee: 1110; Schafer: 1252, 1277; Connolly: 939-40). In addition, the prosecution introduced without objection Phillips' testimony at an unrelated federal trial, in which he testified that he visited Smith eight to ten times at Smith's apartment during the fall of 1968 (1633-37; Peo. Exh. 52).

Petitioner denied having committed the murders. He admitted extorting money from Smith, but denied any contact with him after 1965 (Phillips: 4223-26, 4237-38, 4506-08). He also presented an alibi defense and called several relatives and friends in an attempt to show that he and his wife were in Queens at the time of the shootings (Phillips: 4493-99; Mrs. Phillips: 3431-36, 3439-40; Slack: 3173, 3186-87; J. McKee: 3726; M. McKee: 5250-51; Leavy: 3800-06; Callahan: 5228).

On cross-examination, Mrs. Phillips admitted having told a police officer between the first and second trials that she had lied at the first trial when she testified that petitioner was with her at the approximate time of the murders (Mrs. Phillips: 3554-56).

During cross-examination of petitioner, a tape recording which petitioner had made while cooperating with the Knapp Commission was played. On that recording, Phillips asserted, contrary to what he had said on direct examination, that he was extorting \$100 monthly from Jimmy Smith after 1965.\* After hearing the recording, Phillips admitted that it was of his voice, but still denied having had Smith "on the pad" for \$100 per month (Phillips: 5195, 5215-18).

On cross-examination, petitioner also admitted knowing that the murderer had been described as wearing a green turtleneck sweater, but maintained that he did not own such a sweater and that he never wore green clothes (Phillips: 4692-93). On rebuttal, the People introduced three photographs taken by Henry Bergman, petitioner's business partner, showing petitioner wearing different green shirts (Bergman: 5462-66; Peo. Exhs. 112A, B, D). Bergman also recalled seeing petitioner dressed in green clothes on several occasions, including a green striped polo shirt, a green banlon shirt, and a forest green turtleneck sweater (Bergman: 5457-59).

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\* In its direct case, the People had introduced Phillips' testimony at an unrelated federal trial, in which he testified that he had visited Smith eight to ten times at Smith's apartment during the fall of 1968 (1633-37; Peo. Exh. 52). Phillips' assertions on direct examination in the instant case were inconsistent with this prior testimony, as well as with his statement on the recording.

On November 21, 1974, after just nine hours of deliberation, the jury convicted petitioner of the murders of Smith and Stango and the attempted murder of Gonzalez. On April 26, 1976, the state Appellate Division, First Department, unanimously affirmed the judgment of conviction without opinion. On May 28, 1976, leave to appeal to the New York Court of Appeals was denied by Chief Judge Charles Breitel.

**C. The State Post-Judgment Motion  
Concerning the Tape Recording**

On three separate occasions petitioner was unsuccessful in collaterally attacking his conviction in state court. Pertinent to this appeal, on April 25, 1978, petitioner moved in Supreme Court, New York County (Irving Lang, J.), pursuant to section 440.10 of the New York Criminal Procedure Law, to vacate the judgment of conviction. In this motion, petitioner claimed, for the first time, two years after the conclusion of his direct appeal, three years after his conviction, and six years after his indictment, that a tape recording was improperly used at trial because that recording was obtained pursuant to a grant of immunity. The tape recording at issue was used during cross-examination to impeach petitioner's direct testimony that he never had visited nor ever had extorted money from Smith after 1965. In the recording, Phillips had admitted to Knapp Commission counsel Michael Armstrong that he had put Smith "on the pad" for \$100 per month after 1965.

In his motion, petitioner claimed that the tape recording should have been suppressed because it was made in return

for a promise of immunity. Petitioner alleged that he had received both transactional and testimonial immunity from the United States Attorney for the Southern District of New York. In response to the transactional immunity claim, respondent argued that a United States Attorney had no power to grant transactional immunity that would preclude a state prosecution (Memorandum of Law, pp. 27-31).<sup>\*</sup> In response to the testimonial immunity claim, respondent argued that it was time barred.<sup>\*\*</sup>

On January 3, 1979, the state court judge denied the motion in a written opinion. In doing so, he found that petitioner's argument had two distinct parts. First was the contention that the entire state prosecution was barred because of a grant of transactional immunity. Second was the claim that the use of the tape recording was forbidden by the conferral of testimonial immunity (App: 42a).<sup>†</sup> The court then described petitioner's alternative argument that he had been unaware of the immunity grant and that such unawareness should excuse any procedural default (App: 42a-44a).

In addressing these claims, the state court expressed serious doubt about whether a United States Attorney could grant transactional immunity that would bar a state prose-

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<sup>\*</sup> The memorandum in which the State made its arguments, as well as the State's April 4, 1979 letter responding to petitioner's subsequent motion for reargument are not included in petitioner's appendix, but were before the courts below. Both are available upon request.

<sup>\*\*</sup> Read together, New York Criminal Procedure Law section 710.20(3) & (4) and 710.70(3) require that a motion to suppress involuntary, *e.g.* immunized, statements, be made timely and a defendant who fails to make a timely motion waives his right to judicial determination of such a claim.

<sup>†</sup> "App" in parentheses followed by a number refers to the appendix attached to the Petition for a Writ of Certiorari.

cution. The court, however, then stated that "whether the claim is of testimonial or transactional immunity, it must be timely made" (App: 45a). The judge discussed New York law governing timeliness, concluding that the immunity claims were time barred. The court noted in passing that, in any event, the tape recording in question properly could be used for purposes of impeachment (App: 46a-48a).

Subsequently, petitioner moved for reargument on the ground that *New Jersey v. Portash*, 440 U.S. 450 (1979), prohibited the impeachment use of immunized testimony. In opposition to the motion for reargument, the People stated merely that the claim was time barred (*see* letter of April 4, 1979). The state judge granted reargument and agreed with petitioner that *Portash* prohibited the use of immunized testimony. The court, however, declared unequivocally that petitioner's procedural default was the primary basis, or "major thrust," of its decision to deny the motion to vacate. In passing, the court noted that the tape could not properly have been used for impeachment; nonetheless its use was "harmless error" (App: 37a-38a).<sup>\*</sup> Leave to appeal this order to the Appellate Division was denied.

#### **D. The Federal Court Proceedings Relating to the Immunity Issue**

On April 5, 1979, Phillips filed a petition in the Southern District of New York for a federal writ of habeas corpus, raising the immunity issue as well as two issues involving

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<sup>\*</sup> In its first opinion, the state court, in assuming for purposes of its decision that immunity had been granted, declared that this was "a large assumption in light of the meager evidence submitted to support the claim" (App: 42a). The court seemed to make the same "large assumption" in deciding that use of the tape was harmless error.

alleged juror misconduct. Judge Lawrence Pierce never reached the immunity question, but granted the writ on the ground that a juror was impliedly biased. On September 26, 1980, a divided Second Circuit panel affirmed Judge Pierce's order. However, on January 25, 1982, this Court reversed and remanded for further proceedings in conformity with its opinion, in effect reinstating the state conviction. 455 U.S. 209 (1982).\*

Phillips renewed his petition seeking relief based upon the immunity claim, and respondent renewed its motion to dismiss for failure to state a claim. On November 24, 1982, Judge Gagliardi denied the writ, concluding that the state court had found petitioner's procedural default to be an adequate, independent state procedural ground for denial of his post-judgment motion. 552 F. Supp. 653. Therefore, under *Wainwright v. Sykes*, 433 U.S. 72 (1977), the federal courts could not consider the merits of Phillips' claim unless he demonstrated "adequate cause for his procedural default and prejudice resulting from the alleged violation of federal law." The court found no reason to depart from this principle simply because the state court also had mentioned in passing that use of the tape segment on cross-examination was harmless error (App: 31a).

With regard to Phillips' argument that his alleged lack of knowledge of an immunity grant was sufficient cause for the procedural default, the court found that Phillips' own submissions, including affidavits by himself and by Michael Armstrong, chief counsel to the Knapp Commission, demon-

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\* Contrary to petitioner's assertion (Petition for Certiorari: 21), this Court did not remand for consideration of the immunity claim, which never was before it.

strated that prior to trial he had been informed of a grant of immunity covering all statements made by him to the Commission. Thus, the court held, in view of Phillips' "knowledge of at least a colorable claim of immunity prior to the commencement of his trial," he had shown no cause for his failure to raise this claim (App: 32a-34a).

On September 2, 1983, the Second Circuit unanimously affirmed the denial of the petition for habeas corpus. 717 F.2d 44. The court held that "explicit state court reliance on a procedural default bars federal habeas review of the forfeited claim absent a showing of cause and prejudice regardless of whether the state court ruled alternatively on the merits of the forfeited claim" (App: 9a). The court reasoned that the principle of comity requires federal courts to respect the states' application of their own procedural rules, and an alternative disposition on the merits does not undermine the validity, adequacy or independence of the procedural ground. Also, the goals of finality, accuracy and trial integrity are best served when state courts dispose of all issues, including the merits, so state courts should feel free to rule in the alternative without fear of federal habeas corpus intervention (App: 11a-12a). Finally, applying the *Sykes* "cause and prejudice" test, the court rejected petitioner's claim that his unawareness of an immunity grant was sufficient cause for his default, because "his own sworn statements establish[ed] just the opposite" (App: 16a-17a).

On October 18, 1983, petitioner's motion for rehearing was denied.

## Reasons for Denying the Writ

1. Petitioner argues that certiorari should be granted because there is a conflict among the circuits about whether alternative state court holdings on a procedural default and on the merits bar federal habeas corpus relief. The court below seemed to share the belief that the circuits are divided on the question. Nonetheless, upon analysis of the various circuit court decisions, the alleged conflict disappears.

Six circuits, including the court below, have explicitly concluded that federal habeas corpus review is barred in the face of alternative state court holdings giving effect to a state procedural default and also deciding the merits. *Phillips v. Smith*, 717 F.2d 44, 48 (2d Cir. 1983); *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 650 (7th Cir. 1982); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982); *Dietz v. Solem*, 640 F.2d 126, 132 n.1 (8th Cir. 1981); *Hockenbury v. Sowders*, 620 F.2d 111, 115 (6th Cir.), *cert. denied*, 450 U.S. 933 (1981); *Ratcliff v. Estelle*, 597 F.2d 474, 478 (5th Cir.), *cert. denied*, 444 U.S. 868 (1979). Three of these circuits, including the court below, analyzed the issue in depth before reaching their conclusions. *Phillips v. Smith*, *supra*; *United States ex rel. Caruso v. Zelinsky*, *supra*; *Ratcliff v. Estelle*, *supra*.

The so-called conflict is said to result from language contained in decisions of the Ninth, Fifth, and Eleventh Circuit. However, not one of these decisions even analyzes the issue. Indeed, it is far from clear that any of these three circuits actually reached a holding contrary to that of the court below.



First, the extent of petitioner's Ninth Circuit authority is a footnote in *Bradford v. Stone*, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979). In that footnote, the court assumed for the sake of argument that the state court's failure to rest exclusively upon the procedural default permitted federal court consideration of the constitutional claim. This assumption hardly constitutes a holding, a fact recognized by the court below. 717 F.2d at 50.

Second, from the Fifth Circuit, petitioner cites *Lowery v. Estelle*, 696 F.2d 333 (5th Cir. 1983), and *Thompson v. Estelle*, 642 F.2d 996 (5th Cir. 1981). However, in *Lowery*, the reference to the issue of alternative holdings is contained in a brief footnote, and no language supports petitioner's assertion that the court held in his favor. Rather, the Fifth Circuit found unequivocally that the state court had not relied upon the petitioner's procedural default, but rather had "rested" its decision "on its determination that his several claims were 'totally without merit.' " *Lowery v. Estelle*, 696 F.2d at 342 n.28. Thus, the federal courts were not presented with an express default ruling, even in the alternative.

Similarly, *Thompson v. Estelle*, *supra*, the other Fifth Circuit case relied upon by petitioner, did not present the issue of actual alternative rulings. True, the court in *Thompson* did state that, "Because the state courts have not relied exclusively upon Thompson's procedural default, *Wainwright v. Sykes* does not prevent federal habeas review." *Id.* at 998. Nonetheless, this statement must be read in the context of the state court opinions before the Fifth Circuit. In the final state opinion dealing with the

case, deciding a state petition for a writ of habeas corpus, the state court considered only the merits. *Ex Parte Thompson*, Writ No. W78-50004-L, ¶¶7, 8, 13 (Crim. Dist. Ct. Tex. 1/27/78). Thus, the language in *Thompson*, so heavily relied upon by petitioner to show a conflict, was nothing but *dicta*. Moreover, neither in *Lowery* or *Thompson*, nor in any other case, has the Fifth Circuit overruled or disapproved even implicitly its 1979 decision in *Ratcliff v. Estelle*, *supra*. In the *Ratcliff* case, the court fully analyzed the issue of federal habeas corpus review following actual alternative state court rulings, and held unequivocally that the federal courts were barred from reaching the merits. *Id.* at 475-478.

Third, from the Eleventh Circuit, petitioner cites *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir. 1983), and *Rogers v. McMullen*, 673 F.2d 1185 (11th Cir.), *cert. denied*, — U.S. —, 74 L.Ed. 2d 961 (1983). In *Darden*, the court stated merely that “where a state appellate court has adjudicated an issue on its merits, federal courts may consider it in a petition for habeas corpus.” That no alternative forfeiture holding was at issue in *Darden* is shown by the defense trial objection to the state prosecutor’s conduct and, more importantly, by the Florida Supreme Court’s ruling on the merits. That ruling, which encompassed almost all of the state court’s four page opinion, is in contrast to the single paragraph at the close of the opinion in which the court mentioned in passing the single defense objection. *See Darden v. State*, 329 So. 2d 287, 289-91 (Fla. 1976), *cert. dismissed*, 430 U.S. 704 (1977). The ruling on the merits clearly was, as found by the Eleventh Circuit, the “primary basis of its decision.” *Id.* at 1033-34 and n.4.

Also indicative of the absence of any state forfeiture holding in *Darden* is the Eleventh Circuit's statement that *Ratcliff v. Estelle*, *supra*, "does not compel a contrary result." *Id.*; see also *Witt v. Wainwright*, 714 F.2d 1069, 1082 n.10 (11th Cir. 1983). *Ratcliff*, discussed at page 13, *supra*, is the Fifth Circuit case holding unequivocally that alternative state holdings bar federal habeas corpus review.\*

In addition, the other Eleventh Circuit case upon which petitioner relies, *Rogers v. McMullen*, *supra*, like *Darden*, and the Fifth Circuit's decisions in *Lowery* and *Thompson*, did not present the issue of a state alternative procedural holding. The court did quote the language from *Thompson* that a state procedural holding must be "exclusive" to bar federal consideration of the merits. *Rogers v. McMullen*, 673 F.2d at 1188. However, there was no alternative state forfeiture holding because the Florida Supreme Court had ruled only on the merits of the petitioner's claim. Thus, the language of the Circuit is but *dicta*. See *State v. Rodgers*, 347 So.2d 610 (Fla. 1977).

As seen from the above discussion, no Circuit Court has ever held that a federal habeas corpus court may ignore a state holding of forfeiture if that holding is accompanied by a resolution of the merits. And certainly, no Circuit Court has refused to give effect to a state holding of forfeiture merely because the state court also said the error, if any, was harmless. Thus, the alleged conflict among the circuits is more apparent than real. Indeed, in none of the cases relied upon by petitioner did the federal court even

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\* The Eleventh Circuit has adopted as binding precedent all of the decisions of the Fifth Circuit handed down on or before September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

discuss or analyze whether an alternative state holding should bar federal habeas corpus relief. Such discussion and analysis surely will be stimulated by the opinion below, especially if certiorari is denied. Perhaps then a real conflict would arise. Until then, there is no reason for this Court to consider the question presented here.

2. Petitioner also argues that certiorari should be granted because the holding of the court below is in conflict with the principles governing habeas corpus review articulated in *Wainwright v. Sykes*, 433 U.S. 72 (1977). As revealed by an examination of the opinion below, there is no inconsistency with the principles of *Sykes*. Before examining the decision below, it is necessary to review briefly the state court opinions.

In its first opinion, the state court initially assumed for the sake of argument that the claim of an immunity grant was true, but opined that the United States Attorney had no power to grant transactional immunity (App: 44a). Then, in the lengthiest portion of the opinion, the court analyzed the state rules on the timeliness of immunity claims, and held the contentions that petitioner had received both transactional and testimonial immunity time barred (App: 45a-47a). Finally, again assuming the truth of Phillips' assertions, the court as an afterthought stated that the tape properly had been used for impeachment (App: 48a). In its second and final opinion, the court explicitly reiterated that "the major thrust" of its decision was that petitioner's "claims of immunity were not timely made" (App: 38a). The court's only reference to the merits in that opinion was another hypothetical assumption

that the immunity claim was true and the consequent observation that, in such case, use of the tape was "harmless beyond a reasonable doubt" (App: 38a).

This review of the state court opinions ineluctably leads to the conclusion that, as found by the court below, "the adequacy, independence and primacy of the state court's holding on procedural grounds is 'apparent from the four corners of the opinion.' " 717 F.2d at 50, quoting *Michigan v. Long*, — U.S. —, at —, 103 S. Ct. 3469, at 3474-76 (1983). Given this unequivocal state court procedural determination, the decision of the court below was completely consistent with this Court's opinion in *Wainwright v. Sykes*, *supra*.

True, in *Sykes*, the state court held only that a claim was time barred without mentioning the "merits." Nonetheless, the opinion below eloquently and persuasively demonstrates why the policies underlying *Sykes* apply with equal force here. We state briefly why the *Sykes* principles were properly applied.

The most important principle discussed in *Sykes* is that our federal system requires federal courts, as a matter of comity, to respect state procedural rules. Thus, if a state court refuses to consider a claim on the ground of a procedural forfeiture, the federal courts may not ignore that waiver and consider the merits. 433 U.S. at 88. As both the court below and the Third Circuit have held, a state court's alternative discussion of merits does not diminish the effect of the procedural holding as "binding precedent" and cannot, therefore, lessen its preclusive effect. *Phillips v. Smith*, 717 F.2d at 49; *United States ex rel. Caruso v.*

*Zelinsky*, 689 F.2d at 440. Moreover, here, the state holding regarding forfeiture is absolute. That the state court assumed *arguendo* the truth of the alleged immunity grant, but went on to conclude that any error was harmless, makes clear that the court referred to the "merits" merely to show that its reliance upon default was causing no injustice. *Id.*; *Phillips v. Smith*, 717 F.2d at 51. The interest of comity requires that the federal courts not defeat this purpose and influence the form of a state court determination by refusing to follow an explicit procedural holding. Just as the policy of comity requires that *Sykes* controls here, as the court below also concluded the other policies discussed in *Sykes*, finality, trial accuracy and trial integrity, are fully applicable (*see* 717 F.2d at 48-49).

Finally, the *Sykes* principles rest upon jurisdictional concepts similar to those governing this Court's review of state decisions on direct appeal. The Court recently has reaffirmed the established rule that it will not grant review if the state court judgment rests "alternatively" upon two grounds, one of which is an independent and adequate non-federal ground. *Michigan v. Long*, — U.S. — at —, 93 S. Ct. at 3474-78 and n.4. No doubt this principle would require denial of the petition for certiorari if this case arose on direct review of the state court judgment. The teaching of *Sykes* is to the same effect—that when the state courts have found a procedural default, the petitioner for purposes of federal habeas corpus review is not in custody in violation of the Federal Constitution. *Wainwright v. Sykes*, 433 U.S. at 81. Thus, the holding of the court below is in full accord with the principles of *Sykes* governing federal habeas corpus review of state convictions.

**Conclusion**

***The petition for a writ of certiorari should be denied.***

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